St. John's Law Review

Volume 39
Number 2 *Volume 39, May 1965, Number 2*

Article 27

May 2013

# Foreign Manufacturer of Defective Component Part Held In Personam Under CPLR 302(a)(2)

St. John's Law Review

appear, therefore, that no tortious act was committed in Nassau County.

*Foreign manufacturer of defective component part held in personam under CPLR 302(a)(2).*

*Gray v. American Radiator & Standard Sanitary Corp.*,[53] the leading case holding the manufacturer of a defective component part subject to in personam jurisdiction, has apparently been adopted in New York. The case of *Johnson v. Equitable Life Assur. Soc.*[54] involved a defective speed reducer component manufactured by a Michigan corporation not doing business in New York. This speed reducer, the price of which was almost $1,800, was included in an assembled electric scaffold which fell, causing the deaths of plaintiffs' decedents. The component manufactured by defendant was purchased by a New Jersey manufacturer for inclusion in the new glass wall skyscrapers in New York City. Defendant, Michigan Tool, knew these facts and had occasion to inspect at least one of these installations of the completed product in New York. The appellate division, in holding defendant in personam under CPLR 302(a)(2) stated that the sales and services amounted to "substantial contacts" thus satisfying due process regardless of the fact that there was an intermediate sale through the New Jersey manufacturer. The court further stated that it was unnecessary to determine whether CPLR 302(a)(2) would extend to any component regardless of its cost or function or the ability of the manufacturer to foresee that the product would be introduced into New York. It was sufficient that defendant's contacts with New York "were substantial, were indirectly productive of substantial revenue . . . and the use of its products in this State was within the ambit of its lively expectations and wishes."[55]

Although it appears that *Gray* has been adopted in New York, the practitioner is advised to be wary of relying on a *Gray* situation. An opposing attorney might well distinguish the instant case from *Gray* for several reasons. The defective component in the *Gray* case was a valve included in a completed hot water heater. Though indispensible to the hot water heater, a valve is not a very costly item. The cost of the speed reducer was very substantial. In *Gray* it was not determined how many valves had been introduced into the state. There was a *reasonable inference* that other of defendant's valves were in use in Illinois. In the instant case, a number of these speed reducers were sold to the New Jersey manufacturer to be used in New York. As opposed to *Gray*, there was physical activity by the defendant in New York in *Johnson*. Finally, the

---

[53] 22 Ill. 2d 432, 176 N.E.2d 761 (1961).
[54] 22 App. Div. 2d 138, 254 N.Y.S.2d 258 (1st Dep't 1964).
[55] *Id.* at 140, 254 N.Y.S.2d at 260-61.

court in *Johnson* referred to Section 1.03(a)(4) of the Uniform Interstate and International Procedure Act. This section provides for personal jurisdiction over a non-domiciliary as to a cause of action arising from tortious injury within the state by an act or omission outside the state where defendant *inter alia* "derives substantial revenue from goods used or consumed" within the state. It would appear that the facts of the *Gray* case do not fall within this restrictive standard.

*CPLR 308(4)—Service as the court directs.*

In *Goldenthal v. Terry*,[56] plaintiff after several unsuccessful attempts to serve the defendant personally, thereafter made service pursuant to court order under CPLR 308(4). The court order provided for substituted service[57] which, in effect, permitted plaintiff to *mail* and *affix* to the *last known residence*, as opposed to CPLR 308(3) which permits mailing to the last known residence and affixing to the *present* place of business, abode or dwelling house.[58] Thus, the court order pursuant to CPLR 308(4) was more liberal than CPLR 308(3). Defendant moved to dismiss on the ground that he was not living at the address specified in the order at the time service was made. The court, nevertheless, held service valid since defendant failed to sustain the burden of showing that he had acquired a new residence, and also since he had failed to show that service was not reasonably calculated to give him notice of the suit.

CPLR 308(3) has been drafted in such a manner as to assure that actual notice is given to the defendant.[59] A CPLR 308(4) court order must do likewise. If a defendant has acquired a new residence, mailing and affixing to the old one could hardly be deemed service reasonably calculated to give notice. Thus, if defendant had proved that he had acquired a new residence, service would have been deemed invalid.

It is interesting to note that the plaintiff did not allege that service was attempted pursuant to CPLR 308(3) or that such an attempt would have been impracticable. Resort can be made to CPLR 308(4) when service under subdivisions (1), (2) and (3) would be *impracticable*. According to the Revisers, *impracticable* means *futile*.[60] The practitioner is advised, therefore,

---

[56] 44 Misc. 2d 851, 255 N.Y.S.2d 151 (Sup. Ct. 1964).

[57] CPA § 230 required a court order before substituted service could be utilized.

[58] Service under CPLR 308(3) may be made by "mailing the summons to the person to be served at his last known residence and either affixing the summons to the door of his place of business, dwelling house or usual place of abode within the state . . ." or delivering the summons to a person of suitable age and discretion at one of these places.

[59] FIFTH REP. 266.

[60] *Ibid.*